

Sec 209.1
1085

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of Petition

of

The Gillette Company

for redetermination of deficiencies of
franchise tax under Article 9 A of the
tax law for calendar years 1969 through
1972 and under Section 181 of Article 9
based on the calendar year 1972.

The Gillette Company having filed petition as indicated above, and a hearing having been held on December 18, 1975, at the offices of the State Tax Commission in Albany, New York at which hearing it was represented by Francis A. Goodhue, Jr., Esq. and Jill E. Fallon, Esq., of Counsel and by William Shields, III, Esq., of General Counsel and at which hearing James B. Moore, Esq., Tax Counsel for Gillette and Donne L. Plote, Assistant Field Services Manager for Gillette appeared and testified. The record having been duly examined and considered by the State Tax Commission,

It is hereby found:

(1) The Gillette Company was incorporated on September 10, 1917 under laws of Delaware and has never obtained authority to do business in New York.

(2) It is engaged in the manufacture and sale of razors, blades, shaving cream, deodorants, cosmetics, writing instruments and related products. These activities are conducted through the Safety Razor Division, the (men's) Toiletries Division, the (women's) Personal Care Division and the Paper Mate Division. The Braun Division imports and sells merchandise purchased from an overseas affiliate.

(3) The Gillette Company timely filed activities reports on form CT-245, disclaiming liability for franchise tax for 1969, 1970, 1971 and 1972. Reports on form CT-245 were also filed for

years prior and subsequent thereto. Reports filed for 1968 and all prior years have been accepted as filed.

(4) Because of the amendment of Section 209.1 of Article 9 A of the tax law enacted by Chapter 1072 laws of 1969, activities reports for 1969 and subsequent years were not accepted. In response to a request by field auditors of the Corporation Tax Bureau, The Gillette Company submitted unsigned franchise tax reports. Based on data contained therein, notices of deficiency were issued as follows:

<u>Year</u>	<u>Tax</u>	<u>Additional Charges</u>	<u>Interest</u>	<u>Total</u>
1969	\$129,812	\$32,453	\$34,400	\$196,665
1970	122,332	30,583	25,078	177,993
1971	140,997	35,249	20,245	196,491
1972	154,091	38,523	16,372	208,986
License Fee Based on 1972	900		96	996
Total	\$548,132	\$136,808	\$96,191	\$781,131

(5) Petition for redetermination of deficiencies was timely filed claiming that:

(a) Provisions of Public Law 86-272 prohibit New York State from subjecting it to a tax on or measured by income.

(b) Amendments to Section 209.1 of Article 9 A of the tax law do not subject it to the New York State franchise tax.

(c) Even if it is subject to franchise tax, additional charges are not due.

(6) The general executive offices of The Gillette Company are located in Massachusetts. Divisional headquarters are located in Massachusetts and Illinois, manufacturing and warehousing facilities are located in Massachusetts, Illinois, Minnesota and

California. Since 1970, all New York accounts are serviced by regional and district sales offices located in Massachusetts, Illinois and New Jersey. The corporate retail merchandising office established in 1970 is located in Massachusetts.

(7) In 1969 and prior years, The Gillette Company maintained in New York a regional sales office and two district sales offices, staffed by between 50 and 60 resident employees. In response to expanded jurisdictional standards enacted by Chapter 1072 laws of 1969, all New York offices were closed and either moved outside New York or consolidated into offices outside New York. Since 1970, between 50 and 70 employees of The Gillette Company, many of whom are residents of New York, call on direct and indirect accounts in New York.

(8) Direct (selling) accounts are customers who purchase Gillette products directly, such as wholesalers, retail chains and certain independent retailers. A company salesman calls on the buyer for the customer monthly. Generally, he would discuss the movement of Gillette products and the results of recent promotions. Where a customer fails to meet quota, he offers to furnish a program designed to increase sales. He explains current and future promotions, including the advertising campaign, designed to stimulate sales of the promotion. He solicits an order for the promotion as well as other Gillette products. All orders are subject to approval outside New York and are filled from inventories maintained outside New York. The Gillette Company furnishes automobiles to salesmen which it rents from an out of state leasing company. Salesmen are furnished with samples having a minimal value which they use as they see fit.

(9) Indirect (merchandising) accounts are either retailers who obtain Gillette products from a direct account wholesaler or are

retail outlets of chain food markets, chain drug stores or chain bargain stores, who obtain Gillette products from the chain warehouse. A company merchandiser calls on indirect accounts quarterly or more frequently. He reviews the shelves to see that the current promotion and the full line of Gillette products are on the shelves, properly displayed and in salable condition. If an item is not on the shelves, he may stock the shelves with merchandise from the back room. He would explain the current promotion and may assist in the preparation of an order. Merchandisers do not receive orders. The retailer orders through a wholesaler or from the chain warehouse.

(10) Provisions of Public Law 86-272 are as follows:

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(11) Solicitation is the act of soliciting; Webster's New International Dictionary (Second Edition) defines soliciting as approaching with a request or plea, as in selling, begging, . . .

(12) Section 209.1 of Article 9 A of the tax law is as follows:

1. For the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, . . .

(13) Section 1085 of Article 27 of the tax law is as follows:

(a) (1) In case of failure to file a return under article nine, nine-a, nine-b or nine-c on or before the prescribed date (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax . . .

The State Tax Commission hereby

DECIDES:

(A) Activities of Gillette employees within New York are not limited to solicitation of orders as defined in (11) above; calls on indirect accounts described in (9) above, are primarily to insure that goods already sold and delivered to customers in New York, are on the customer's shelves, properly displayed and in salable condition. Such merchandising is local in nature and is not solicitation as contemplated by Public Law 86-272.

(B) Activities conducted in New York by The Gillette Company through regional and district sales managers, salesmen and merchandisers constitute doing business or employing capital

or owning or leasing property as contemplated by Chapter 1072 laws of 1969.

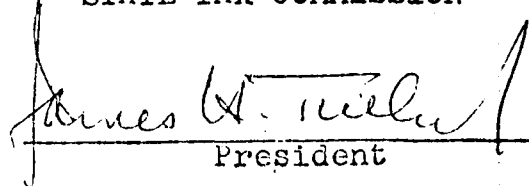
(C) Filing of activities reports disclaiming liability for filing franchise tax reports is reasonable cause for failure to file such franchise tax returns and additional charges assessed under Section 1085 of Article 27 of the tax law are not properly due.

(D) Deficiencies set forth in (4) above, except as noted in (C), only include amounts properly due.

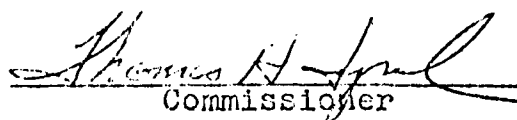
Dated: Albany, New York

this 21st day of April 1976.

STATE TAX COMMISSION


President


Commissioner


Commissioner